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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

**October Term, 1991**

THOMAS MICKENS,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented for Review

1. Did the "Protective Sweep" of Petitioner's Home Executed by the Agent Who Examined Personal Papers and Areas Not Large Enough to Conceal Individuals Exceed the Bounds Permitted by the Fourth Amendment?

2. Was There an Impermissible Constructive Amendment of the Indictment in the Trial Court's Charge to the Jury Which Permitted the Finding of Any Illegal Activity to Constitute the Conduct Necessary for the Money-Laundering Count?

3. Did the Trial Court Improperly Apply the Sentencing Guidelines in Determining This to Be a "Straddle" Conspiracy When Petitioner Was Acquitted of All Acts Occurring After the Enactment of the Guidelines?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Thomas Mickens, most respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 30, 1991.

### Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported 926 F.2d 1323, and is reprinted herein as Appendix "A" hereto, p. 1a, *infra.*

A copy of the order denying rehearing appears herein as Appendix "B."

**Statement of Jurisdiction**

Jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. § 1254(1). Judgment of the Court of Appeals for the Second Circuit was entered on April 30, 1990. On that date, Petitioner was unavailable to be notified of the Court of Appeals' decision, as he had been subpoenaed by the United States Attorney for the District of New Jersey to appear in Grand Jury in that state. At some time during the lengthy bus trip from Petitioner's place of incarceration (FCI Lompoc California) to New Jersey, notification was sent to his institution. Upon fulfillment of the subpoena's requirements, Petitioner was returned to California and was advised that he was being redesignated to the FCI at Fairton, New Jersey, an institution in the Northeast Region. He has been travelling to his final destination for a number of weeks and has not been in a position to communicate until October 15, 1991. Hence the timing of this application.

**Constitutional Provisions Involved**

1. United States Constitution, Fourth Amendment;

2. United States Constitution, Fifth Amendment; and

3. United States Constitution, Article I, Section 10 Cl. 1.

## Statement of the Case

Petitioner, Thomas Mickens, was convicted following a jury trial in the Eastern District of New York (Platt, Ch.J.) on June 28, 1989. The charges upon which there was a conviction were: narcotics conspiracy (21 U.S.C. § 846); money-laundering conspiracy and predicates (18 U.S.C. §§ 371 and 1956); failure to file income tax returns (26 U.S.C. § 7201); filing of fraudulent tax returns (26 U.S.C. § 7206); structuring currency transactions (31 U.S.C. § 5324(3)).[1]

Petitioner was sentenced pursuant to the Federal Sentencing Guidelines to a term of imprisonment to a total of 35 years' imprisonment on all counts. A $1,000,000 fine and $800 special assessment were also imposed. Petitioner is currently incarcerated serving this sentence.

During the trial, the government's theory of prosecution against Petitioner was that he controlled a mammoth narcotics enterprise supporting the purchase of millions of dollars in cars, boats and real estate. In support of that theory, the government introduced testimonial and physical evidence stemming from an exceptionally detailed "*protective sweep*" search of two full floors of rooms, closets and bathrooms at 4 Deanna Court, Dix Hills, New York, the location of Petitioner's arrest; testimony of government agents detailing two specific, though relatively minor, drug sales by individuals peripherally involving Petitioner, along with evidence of prior acts; testimony of car dealers regarding purchases

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1. Petitioner Mickens was acquitted of two substantive charges involving two sales to an undercover officer. Mickens established his presence in California and Maryland on those occasions.

from them by Petitioner or his alleged "nominees"; and testimony from several other witnesses detailing the purchase of real estate, including one of Petitioner's former attorneys. The extensive and intricate evidence of narcotics transactions, no matter how small, along with purchase records of expensive luxury items, were offered as proof of the conduct and fruits of Petitioner's alleged drug trade.

According to the government's proof at the suppression hearing and at trial, in the early morning of May 10, 1988, an arrest team assembled outside 4 Deanna Court in Dix Hills, New York. Following a confirmatory telephone call to the house, the arrest team split up, covering front and back entrances to the house. A New York City Police Sergeant, Frank Tartaglia, and two others, knocked on the front door and placed Petitioner under arrest upon his answering it. Tartaglia and his group of officers then entered the house and conducted a full security sweep. These safety precautions concluded, Tartaglia opened a back door to admit Agent Pilafian and an IRS agent. Despite the comprehensive security check just completed by Sgt. Tartaglia and without inquiring at all as to the conduct or outcome of that search, Agent Pilafian proceeded to conduct her own search throughout the entirety of the premises.

Moreover, although 48 hours of continuous pre-arrest surveillance as well as her own observations of the scene revealed no indications of third persons on the premises, Agent Pilafian's search extended throughout the almost 5,000-square-foot home.

While Petitioner's home was quite extensive, containing many rooms and closets, Agent Pilafian testified

that this entire process elapsed over a period of only 90 seconds. During this high-speed search, Pilafian claims to have noticed many items "within plain sight" including names and addressed on letters, identification papers and their contents, names on checks as well as names on bottles of prescription medication bearing the name "Thomas Harris" and a spiral notebook located under a computer, although the agent claims to have never stopped her protective sweep to examine any item. It must be noted, however, that none of these items were located in areas which might be believed to be housing hiding persons.

Agent Pilafian proceeded to recount her observations in a telephone application for a warrant to search the home which was issued at approximately 1:30 p.m. the same day. While many personal papers were seized in the extensive search that ensued, neither drugs, drug records nor weapons were discovered.

**The Money-Laundering Count**

The indictment charged the Petitioner, and others, with, *inter alia,* a conspiracy to defraud the United States by conducting and attempting to conduct financial transactions which involved the proceeds of a "*specified, unlawful activity to wit: narcotics distribution*" in a manner which was designed to conceal the source, ownership and control of the proceeds in violation of 18 U.S.C. 1956(a)(1)(i) and (2) and by conducting financial transactions which involved the proceeds of "*narcotics distribution*" in a manner to avoid the federal reporting requirements of 18 U.S.C. 1956(a)(1)(B)(ii) and 2, and counts 13 through 16, 18 and 19 charged the Petitioner with the substantive violations of the money-laundering statute by knowingly

and wilfully conducting financial transactions which involved the proceeds of "narcotics distribution" in a financial transaction.[2]

In its opening statement, the prosecution clearly spelled out its theory, telling the jury that Mickens was a *drug dealer* whose business was so profitable that he had amassed a large fortune, property and luxury items. The government emphasized that its case was about drugs and money and what Petitioner did to not pay taxes on such money.

The proof at trial followed the same tack, including testimony of other charged and uncharged narcotics crimes under Federal Rules of Evidence 105 and 404(b) "as proof of the source of the money-laundering count as well as Petitioner's knowledge of the source of such *drug* money."

Petitioner's counsel, outlining the defense theory of the case, argued that the money's source was in fact a multi-million-dollar inheritance from the gambling numbers operation run by his late father from the 1940's until his death in the early 1970's - not the few minuscule drug sales the government was able to demonstrate. Witnesses testifying for the defense included family members and former gambling employees of Thomas Harris, Sr. who illustrated the nature of his gambling business (as much as $40,000 a week in gross profits) as well as confirming the presence of large sums of money flowing from that business, in the Mickens' home.

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2. No part of the indictment charged the defendants with violating the money-laundering statute by conducting financial transactions which involved the proceeds of felony gambling or any other illegal source in violation of federal or state law.

Prior to deliberation, and despite the specific and contrary language of the indictment, the District Court charged the jury to consider whether "defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state or federal law. I instruct you as a matter of law that narcotics distribution is a felony, as is, for example, gambling." (See Appendix C, p. 31a). Defense counsel strenuously objected to this charge as a serious departure from the grand jury's version of the charges. The District Court at the government's urging attempted "to cure" its prior charge with another instruction. Instead, the new charge exacerbated the damage to the indictment by broadening the charges even further, telling the jury they must determine whether "the defendant knew the property involved in the transaction represented proceeds from some form, though not necessarily *which* form, of activity that constitutes a felony under state or federal law ...." The trial judge went on to elaborate "... I instructed you as a matter of law that narcotic distribution is a felony, but so are many other types of activities, illegal activities, and I think *I said so is illegal gambling, but I don't want to restrict it to that.* The knowledge is that the property involved in the financial transaction was the proceeds of *some* form of unlawful activity. That's the second element of their offense." (p. 32a; emphasis added).

**Misapplication of Sentencing Guidelines**

In sentencing Petitioner, the trial judge erroneously applied the newly enacted Federal Sentencing Guidelines to convictions for which all of the overt acts occurred

prior to November 1, 1987. Petitioner was convicted of one "straddle"[3] narcotics conspiracy for which the indictment charged only two substantive acts "in furtherance" subsequent to the November 1, 1987 enactment of the Guidelines. These two acts were enumerated in the indictment in Counts Four and Five. Count Four argued that on January 27, 1988, Petitioner and his co-defendant Jenkins distributed cocaine; Count Five argued this same activity on March 11, 1988.

The jury acquitted Petitioner on both Counts Four and Five after trial. Consequently, what was indicted as a "straddle conspiracy," theoretically encompassing substantive acts from July 23, 1987 through May 1, 1988, was effectively deemed a wholly pre-Guidelines conspiracy by the jury's not guilty verdict as to the sole, post-November 1, 1987 acts. In determining the Petitioner's offense level, the District Court concluded that the amount of money expended by the Petitioner in the period 1984-May 1987 equated to more than 50 kilograms. This conclusion was arrived at despite the fact that there was no evidence whatsoever of narcotics activity in that period. The District Court relied upon the Guidelines' requirement and sentenced Petitioner to a total of 35 years incarceration, including a twenty-year sentence for the narcotics conspiracy.

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3. The term "straddle" offenders has been used to describe defendants whose alleged illegal conduct occurred both pre- and post-Guidelines and must be sentenced under the Guidelines. See *United States v. Story,* 891 F.2 988 (2d Cir. 1989).

## Reasons For Granting The Writ

### Point I

**A Discrepancy Exists Between the Decision Below and Applicable Decisions of This Court as to Whether, and to What Extent, "Protective Sweep" Searches of an Arrestee's Dwelling by Law Enforcement Personnel Are Justified by Such Officers' Reasonable Belief of Third-Party Presence Endangering the Officers or Evidence on the Premises.**

Relying upon *United States v. Escobar,* 805 F.2d 68 (2nd Cir. 1986) and *United States v. Jackson,* 778 F.2d 933 (2nd Cir. 1985), *cert. denied,* 479 U.S. 910 (1986), the trial court sustained the legality of Agent Pilafian's search of 4 Deanna Court. Petitioner's motion to suppress the quantities of personal property seized during the search predicated upon her findings was thus denied; this decision was affirmed by the Second Circuit on appeal (full text of opinion attached as Appendix A).

Although the Fourth Amendment may bend to accommodate a "[p]rotective sweep" of a dwelling during the arrest of one of its occupants, the scope of such a search must be narrowly circumscribed. The raison d'etre for such a "sweep" is the discovery of persons other than the arrestee who might threaten harm to officers or to evidence on the premises. Thus, reason mandates that a mere cursory inspection of spaces large enough to conceal a human being is all that is permitted, since no more is required.

Recently in *Maryland v. Buie,* _____U.S._____, 110 S.Ct. 1093 (1990), this Court outlined the Constitutional standards for the initiation and full extent of such "protective sweeps." This Court sagely permitted officers "... as a precautionary matter, and without probable cause or reasonable suspicion to look in closets and other spaces *immediately adjoining the place of arrest* from which an attack could be immediately launched." 110 S.Ct. at 1098. (emphasis added). Further holdings permitted the instigation of such a search only upon "... articulable facts which taken together with the rational inferences from those facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* This Court in fact emphasized that such a "protective sweep, aimed at protecting the arresting officers, is nevertheless *not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.*" *Id.* at 1099 (emphasis added).

Agent Pilafian's search extended well beyond the permissible boundaries of a protective sweep as evidenced in her detailed description of the premises when applying for a search warrant.

An analysis of the law as applied to the facts of this case demonstrates that the admission at trial of evidence seized in the second security sweep at 4 Deanna Court clearly violated this Court's own recently articulated limitations upon "protective sweeps" in *Maryland v. Buie, supra.* Therefore, it squarely presents for resolution a significant issue upon which the District Court and the Second Circuit have acted in conflict with the applicable decision of this Court that a "protective sweep" of a dwelling may only include a cursory glance into the

surrounding areas able to conceal human beings and not a full-scale search of an entire two-story home including the examination of small papers.

## Point II

**A Discrepancy Exists Between the Decision Below and Applicable Rulings of This Court as to Whether Charges Once Delineated by a Federal Grand Jury May Be Broadened to Include Facts and Circumstances Not Included in the Indictment.**

The charges herein included a money-laundering count for which the indictment specified the necessary unlawful activity of narcotics distribution and conducting financial transactions which involved the proceeds of such unlawful activity.

The Trial Court's initial charge to the jury both amended and broadened the indictment, which specifically and repeatedly charged the money-laundering counts as utilizing *narcotics* proceeds, by charging that "...as a matter of law ... narcotics distribution is a felony, as is, for example, gambling." (p. 31a). This explanation of the charge's elements went so far beyond the plain words of the indictment as to render it impossible to know whether the jury convicted the crime charged or what amounts to another offense altogether.

This Court has already ruled decisively on precisely the sort of amendment to an indictment in Petitioner *Mickens*' case. In 1960, *Stirone v. United States* (361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 252) determined that "after an indictment has been returned its charges may not be broadened except by the grand jury itself." *Id.*, 361 U.S.

at 215-216, noting that the law on this subject remained substantially unaltered since the 1887 decision in *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849. The facts of *Stirone* could hardly be tailored to fit the case at hand more accurately. The indictment there charged the defendant with interference with interstate commerce and extortion. While in theory many forms of interference *could* have formed the basis for a conviction of that charge, only *one* was charged in the grand jury's indictment. An additional type of interference, not included in the indictment, was charged by the trial Court and a conviction resulted. In reversing the conviction, this Court held that:

> [w]hen only one particular type of commerce is charged to have been burdened [interfered with] a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. *Id.,* at 218.

In the instant prosecution, the indictment (throughout the general conspiracy and substantive money-laundering counts) specifically charged *only* narcotics distribution as the source of proceeds being laundered and profiting conspiracy "members." The grand jury, just as it had in *Stirone,* chose from multiple possible bases for the charges specifying a single factual basis for such charge: the conduct of a narcotics conspiracy. The District Court's case went far beyond that reversed in *Stirone*; at first adding only "gambling" as an activity providing sufficient grounds to satisfy the element, and then stating "I don't want to restrict it to that," going on to require only a finding of "*some form* of illegal activity." (A. 32a).

Not only did this charge far exceed the charge determined by the grand jury, it incorrectly stated the law as well. 18 U.S.C. § 1956 requires that the unlawful activity involved be a felony. *See, e.g.,* Sand, *Modern Federal Jury Instructions,* Instruction 50A-20. This is particularly significant considering that gambling is not, *per se,* a felony in New York. (P.L. § 225.00 *et. seq.*)

Various Courts of Appeals, in applying the principles of *Stirone,* have unhesitatingly reversed convictions where, as here, there has been a constructive amendment of an indictment. The Fifth Circuit upheld the Fifth Amendment as interpreted by *Stirone* when it held that "... a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense as charged." *United States v. Adams,* 778 F.2d 1117 (5th Cir. 1985), citing *United States v. Salinas* (Salinas II), 654 F.2d 319, 324 (5th Cir. 1981), overruled in part on other grounds, *United States v. New Buffalo Amusement Corp.,* 600 F.2d 368, 381 (2nd Cir. 1979) (Oakes, J., concurring).

In *Adams,* as in the current case, the indictment specified that the means by which defendant was alleged to have purchased handguns using false identification violated the statute, *i.e.*, "the indictment charged Adams only with misrepresentations as to name." *Id.* at 1119. Thus, "[b]y allowing proof of residence and charging the jury so as to permit a conviction based on misrepresentation and false statements as to residence, the trial court constructively amended the indictment, thereby denying [defendant] his Fifth Amendment right to be tried only upon those charges presented to and accepted by a grand jury." *Id.*

The Sixth Circuit too has reversed when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Hathaway,* 798 F.2d 902, 910 (6th Cir. 1986).

Even the Second Circuit, notwithstanding the result below, has recognized that reversal is constitutionally required when "there was a constructive amendment of the indictment," stating, "we must be especially alert to 'subtle attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'" *United States v. Mollica,* 849 F.2d 723 (2nd Cir. 1988); *United States v. Rosenblatt,* 554 F.2d 36, 40, quoting *Grunewald v. United States,* 353 U.S. 391, 404, 77 S.Ct. 963, 974, 1 L.Ed.2d 931 (1957), making it "critical that courts 'vigilantly enforce the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury.'" *Id.* at 729, quoting *United States v. Weiss,* 752 F.2d 777, 791 (2nd Cir.), *cert. denied,* 474 U.S. 944 (1985) (Newman, J., dissenting in part).

Moreover, the obvious constitutional objective behind this crystal-clear rule is to ensure the right of an accused to know with specificity what behavior he is required to defend. The simple rule delineated by this Court in *Stirone* has been ignored. Certiorari should thus without question be granted to conform the decisions in the Second Circuit with the applicable rule of law enunciated by this Court prohibiting the unconstitutional amendment of criminal indictments.

## Point III

**A Conflict Among Circuits Exists Regarding Whether the Application of Federal Sentencing Guidelines Effective November 1, 1987, to Conspiracies Whose Underlying Acts Are All Found to Have Occurred Prior to That Date Constitutes an *Ex Post Facto* Application of Law Such as Proscribed in U.S.C.A. CONST. ART. 1, § 10,cl.1.**

The central purpose of the *ex post facto* clauses of the United States Constitution (Article I, § 9, cl.3; Article I, § 10. cl.1) is to ensure that all legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," *Miller v. Florida,* 48 U.S. 423, 107 S.Ct. 2446, 2451 (1987), quoting *Weaver v. Graham,* 450 U.S. 24, 28-29, 101 S.Ct. at 964. Moreover, in the very first case to consider the meaning and scope of the *ex post facto* prohibition, the Supreme Court of 1798 included in that prohibition "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull,* 3 Dall. 386, 1 L.Es. 648 (1798). Obviously, by this standard, no acts committed prior to November 1, 1987 may be punished by laws publicly declared effective as of that date.

Petitioner was originally charged with a "straddle" conspiracy along with two very minor acts in furtherance thereof occurring post-November 1, 1987, yet the jury determined that he was not guilty of either of these acts. Hence the entire conspiracy charged in Count One must have occurred prior to November 1, 1987. Although it appears a matter of clear constitutional interpretation to include such application in the *ex post facto* prohibition, the Circuits are at variance on this topic, and clearly

require this Court's definitive intervention to settle the question of the Guidelines' application.

The Second Circuit has held that the sentencing guidelines do apply to a "straddle" conspiracy when at least some acts in furtherance of that conspiracy occurred after the effective date of the act. *United States v. Story,* 891 F.2d 988 (2d Cir. 1989). Circuits have addressed this issue and concluded that if it is not shown that the charged pattern of illegal activity included conduct occurring after the effective date of the Act, the district court should not impose a sentence under the Guidelines. *See, United States v. Bloom,* No. 91-1154 slip op. 7103, 7110 (2d Cir. August 26, 1991); *United States v. Masters,* 924 F.2d 1362, 1363 (7th Cir.), *cert. denied,* 111 S.Ct. 2019 (1991); *United States v. Wayne,* 903 F.2d 1188, 1196-97 (8th Cir. 1990).

In *United States v. Bloom,* No. 91-1154 slip op. 7103 (2d Cir. August 26, 1991), during the plea allocution, the defendant, Bloom, pleaded guilty only to conduct occurring prior to November 1987 and was sentenced under Pre-Guidelines law. Bloom appealed this sentence arguing that a verdict or plea of guilty represents a finding or an admission that he committed *all* of the illegal conduct charged. The Second Circuit, however, concluded that by virtue of his statements made at the plea allocution, the defendant did not admit to any alleged conduct occurring post-Guidelines. Thus, the district court did not err in

finding by a preponderance of the evidence[4] that the defendant's illegal conduct occurred pre-Guidelines.

Similarly, where a defendant has been acquitted of all substantive acts occurring after November 1, 1987, the jury has, in essence, made a statement that the defendant's conduct did not extend beyond the effective date of the Act. An application of the holding to the facts in such a case would necessary demand sentencing under pre-Guidelines law.

Contrary to the Second Circuit, the Eleventh has, just as recently, decided that the "ex post facto clause may bar application of the Guidelines, [even] notwithstanding the fact that the conspiracy may have continued beyond [November 1, 1987]," if the alleged co-conspirator has withdrawn participation by that date. *United States v. Pippin,* 903 F.2d 1478, 1481 (11th Cir. 1990). Clearly, by this analysis, where a jury rejects the only acts comprising the continuation of the conspiracy beyond November 1, 1987, the *ex post facto* clause must prevent a Guidelines sentence from being imposed.

The confusion characterizing this issue is demonstrated yet again in the Eighth Circuit's ruling in *United States v. Tharp,* 884 F.2d 1112 (8th Cir. 1989). The Circuit Court of Appeals therein remarked that "from the face of the statute [Sentencing Reform Act] it is unclear

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4. The determination as to whether [defendant's] offense continued past the effective date of the Guidelines is a sentencing factor and may be resolved by the district court using a preponderance of the evidence standard. *United States v. Bloom,* No. 91-1154 slip op. at 7109 (quoting *United States v. Underwood,* 932 F.2d 1049 (2d Cir. 1991)).

whether a conspiracy which straddles the effective date was meant to be covered by the Guidelines." *United States v. Tharp,* 884 F.2d at 1114. It is evident from the discrepancies existing among the Circuits that clarification on this pressing issue of Guidelines application is necessary.

Petitioner further contends that, even if the Federal Sentencing Guidelines did control for purposes of sentence, they were inaccurately calculated and illegally applied. The determination contained in ¶ 32 of the Presentence Report that Petitioner's "large scale narcotics organization" distributed over 50 kilograms of cocaine is totally arbitrary and bereft of factual support.

This quantity was determined (relying upon Application Note 2 of § 201.4) by an equation based upon a $2,188,538 profit claimed to proceed from the sale of mammoth quantities of narcotics. There is simply no evidence that this scenario is, or ever was, accurate. At the close of trial, the trial Court instructed the jury in this matter that they would convict if they found *any* illegal activity at all supplied the money spent by the Petitioner in the early 80's. The jury convicted without a special or particularized verdict, and given the sweeping breadth of the trial court's charge, it would be logically impossible to ascertain whether the jury convicted because it found those funds to be narcotics proceeds, gambling proceeds, or any other form of illegal money. Indeed, it is far more likely that they convicted on a theory other than narcotics proceeds since to have relied upon monies which did not even begin to flow until after the "spending spree" charged was finished, would clearly have produced logically and legally inconsistent verdicts as between the conspiracy and the money-laundering counts. Consequently, the "profits"

attributed to Petitioner by the government bear absolutely no relation to the amount of drugs purported to be sold by his organization.

As the government itself argued in its October 5, 1989 letter to the Court: "without reviewing the overwhelming evidence, we need only point to the indisputable facts. 1) The jury convicted Petitioner of conspiring to sell narcotics between July, 1987 and May 1988. 2) The jury convicted Petitioner of numerous money-laundering counts beginning in November 1986 [a full eight months prior to the beginning of the narcotics conspiracy which supposedly provided the money to be laundered!]. An element of each of those counts was that the money that was being 'laundered' was, in fact the proceeds of narcotics dealing [as charged in the indictment; however, as explained above, the trial court expressly broadened that element to include *any* illegal activities in general, and the defense's own theory of gambling proceeds in particular]. 3) The jury convicted Petitioner of four counts of evading income tax on a total income in excess of $2,000,000 for the time period 1984 through 1987 [three years wholly *preceding* the 1987-88 narcotics conspiracy supposed to have produced such money]." The simple fact is, all the money and all the expenditures occurred before the narcotics conspiracy was even alleged to have *begun* - so it is plainly impossible for quantitative narcotics transactions to be presumed due to the occurrence of those expenditures or the presence of that money.

Since the derivative equation used to attribute "over 50 kilograms" to those sales, resulting in an offense level of 36, is so pervasively unsupported (and insupportable), that offense level determination must fall. The illegal and

illogical manner of application of the Guidelines in this case further merits a grant of certiorari, to permit the establishment of some ground rules for the Guidelines' use in the District Courts.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 30, 1991

Respectfully submitted,

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# APPENDICES

**Appendix A**
**Opinion of United States Court of Appeals**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 157, 158, 159, 160, 161 August Term, 1990

(Argued: October 25, 1990 Decided Feb. 26, 1991)

Docket Nos. 90-1061, -1062, -1063, -1064, -1097

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UNITED STATES OF AMERICA,
*Appellee, Cross-Appellant,*

-v.-

THOMAS MICKENS, ANTHONY JACOBS,
SHELBY KEARNEY,
*Defendants-Appellants,*

BETTINA JACOBS CELIFIE,
*Defendant-Appellant, Cross-Appellee.*

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BEFORE:
MESKILL and ALTIMARI, *Circuit Judges,* and
METZNER, *District Judge.**

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* The Honorable Charles M. Metzner, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

*Appendix A*
*Opinion of United States Court of Appeals*

Appeal and cross-appeal from judgments of conviction, entered in the United States District Court for the Eastern District of New York (Platt, *C.J.*), for violation of various narcotics and money laundering statutes.

Affirmed in part, reversed in part, and remanded.

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JOHN L. POLLOK, New York, N.Y. (Michael H. Gold, Susan C. Wolfe, Hoffman & Pollok, New York, N.Y., of counsel), *for Defendant-Appellant Mickens.*

ROBERT L. ELLIS, New York, N.Y., for *Defendant-Appellant Kearney.*

GEORGIA J. HINDE, New York, N.Y. (Vivian Shevitz, New York, N.Y., of counsel), *for Defendant-Appellant Jacobs.*

CHRIS P. TERMINI, Melville, N.Y. (Scalzi & Nofi, of counsel), *for Defendant-Appellant, Cross-Appellee Celifie.*

KIRBY A. HELLER, Assistant United States Attorney, Eastern District of New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Matthew E. Fishbein, Susan Corkery, Assistant United States Attorneys, Eastern District of New York, of counsel), *for Appellee, Cross-Appellant.*

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*Appendix A*
*Opinion of United States Court of Appeals*

ALTIMARI, *Circuit Judge:*

Defendants-appellants Thomas Mickens, Anthony Jacobs, Shelby Kearney, and Bettina Jacobs Celifie appeal from judgments of conviction, entered in the United States District Court for the Eastern District of New York (Thomas C. Platt, *Chief Judge*).

Following a four-month jury trial, Mickens was convicted of conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (1988); conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (1988); four counts of income tar evasion, in violation of 26 U.S.C. § 7201 (1988); one count of filing a perjurious income tax return, in violation of 26 U.S.C. § 7206(1) (1988); eight counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (ii) (1988); and, one count of structuring a financial transaction as part of a pattern of illegal activity, in violation of 31 U.S.C. § 5324(3) (1988). Shelby Kearney and Bettina Jacobs Celifie were each convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and one count of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Celifie was also convicted of one count of structuring a financial transaction as part of a pattern of illegal activity, in violation of 31 U.S.C. § 5324(3). Anthony Jacobs pleaded guilty to conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; and, two counts of distrib-

uting cocaine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C).

On appeal, defendants-appellants Mickens, Kearney, and Celifie contend that comments made by the district court during trial deprived them of their constitutional right to a fair trial. They also challenge the court's denial of a motion to suppress certain evidence, its rulings on various evidentiary questions posed during the course of the trial, and its instructions to the jury regarding the elements of a section 1956 violation. Moreover, they question the constitutionality of the currency reporting requirements of 18 U.S.C. § 5313 (1988). Defendant-appellant Jacobs appeals from his sentence of imprisonment. He contends that, in calculating his offense level, the district court improperly attributed to him the entire quantity of narcotics for which Mickens was found responsible. The government cross-appeals from the district court's decision to downwardly depart in sentencing defendant-appellant Celifie.

For the reasons set forth below, the judgments of the district court are affirmed in part, reversed in part, and remanded.

**Background**

Between 1984 and 1988, defendant-appellant Thomas Mickens directed a lucrative cocaine distribution network in Queens, New York. At trial, two law enforcement officers testified about numerous undercover

cocaine purchases from individuals identified as Mickens' underlings. For example, on two separate occasions undercover officer Austin Fields purchased cocaine from defendant-appellant Anthony Jacobs, a reputed "lieutenant" in the Mickens organization. On another occasion, surveillance agents spotted Mickens in the vicinity of a narcotics transaction between undercover Officer Terance Miller and another Mickens' associate, George Jenkins. Officer Miller also purchased cocaine directly from Mickens while both men were seated in an undercover police car.

In addition to the direct evidence of narcotics activity, the prosecution presented evidence of Mickens' lavish spending. The testimony of several automobile salesmen and insurance agents connected Mickens to the purchase of eighteen automobiles, costing a total of approximately $556,000. Trial evidence also established that Mickens purchased some sixteen properties, including commercial property in Queens, a $730,000 residence in Dix Hills, New York, a residence in Miami, Florida, and a condominium in California. Mickens' former attorney testified that he assisted Mickens in purchasing several properties using cash and money orders. He also testified that he helped Mickens launder money by preparing contracts and closing documents that significantly understated the properties' actual purchase prices.

Additional evidence of Mickens' automobile and real estate purchases was obtained during a warrant-authorized search of the Dix Hills residence. The warrant permitting the search was obtained on the basis of

observations made by FBI agent Nerisa Pilafian during a "protective sweep" of the premises in connection with Mickens' arrest. Mickens moved before the district court to suppress the evidence obtained from the Dix Hills residence, claiming that Agent Pilafian's protective sweep was not justified by the circumstances of the arrest. This motion was denied.

Many of Mickens' automobile and real estate purchases were accomplished through the use of nominees, including defendants-appellants Kearney and Celifie. For example, trial evidence established that Kearney, who was Mickens' girlfriend, acted on Mickens' behalf in the purchase of property in Hempstead, New York and the residence in Dix Hills, New York. The prosecution also presented evidence that Bettina Jacobs Celifie acted as Mickens' nominee in purchasing the California condominium, as well as a $133,350 yacht.

Following a four-month jury trial, defendant-appellant Mickens was convicted of, *inter alia*, conspiracy to distribute and to possess with intent to distribute cocaine, conspiracy to defraud the United States, income tax evasion, and money laundering. He was sentenced to an aggregate term of imprisonment of thirty-five years, a fine of $1,000,000, and a special assessment of $800. Defendants-appellants Kearney and Celifie were each convicted of conspiracy to defraud the United States and money laundering, and Celifie was also convicted of structuring a financial transaction as part of a pattern of illegal activity. Kearney was sentenced to concurrent five-year terms of imprisonment on each count, to be followed

by two years' supervised release, a fine of $200,000, and a $100 special assessment. Celifie was sentenced, pursuant to a downward departure, to concurrent eighteen-month terms of imprisonment on each count, to be followed by two years' supervised release, and a $150 special assessment. Defendant-appellant Anthony Jacobs, who pleaded guilty to conspiracy to distribute cocaine, conspiracy to defraud the United States, and distributing cocaine, was sentenced to 327 months' imprisonment, to be followed by a five-year term of supervised release, and a special assessment of $200. This appeal and cross-appeal followed.

**Discussion**

**I. The Unfair Trial Claim.**

Defendants-appellants Mickens, Kearney and Celifie claim that the district court's admonitions to counsel and questions of witnesses deprived them of a fair trial. Defendants-appellants claim that the court "poisoned the courtroom atmosphere and prevented a fair trial." We disagree.

While many of the court's remarks were unfortunate, their cumulative effect was not a deprivation of the right to a fair trial. A trial judge "'need not sit like a "bump on a log" throughout the trial.'" *United States v. Bejasa,* 904 F.2d 137, 141 (2d Cir.) (quoting *United States v. Pisani,* 773 F.2d 397, 403 (2d Cir. 1985)), *cert. denied,* 111 S.Ct. 299 (1990). As this Court recently stated:

> Judges, being human, are not immune to feelings of frustration at the occasional antics or inartfulness of attorneys or impatience at the evasiveness of witnesses. Such feelings may give vent to remarks which, judged in isolation from the totality of the record through the dispassionate looking glass of hindsight, "would better have been left unsaid." Yet, analysis of such comments, taken out of context of the entire record, is not the proper basis for review. Rather, we must make "an examination of the entire record," in order to determine whether the defendant received a fair trial.

*Id.* at 141 (quoting *United States v. Robinson,* 635 F.2d 981, 985 (2d Cir. 1980), *cert. denied,* 451 U.S. 992 (1981), and *United States v. Mazzilli,* 848 F.2d 384, 389 (2d Cir. 1988)). Viewing the record in the present case in its entirety, it is clear that defendants-appellants received a fair trial. The district court's occasional intemperate remarks did not substantially taint defendants-appellants' trial. It must be noted that these remarks were provoked to some extent by one defense counsel's despicable verbal assault on the court. That attorney's conduct was so egregious that, after verdict, the court advised counsel that it intended to file a complaint with the Grievance Committee of the Eastern District of New York. Moreover, any possible prejudice to defendants-appellants was cured by the court's cautionary

instruction.[1] *See United States v. Bejasa,* 904 F.2d at 141; *United States v. Gurary,* 860 F.2d 521, 527 (2d Cir. 1988), *cert. denied,* 490 U.S. 1035 (1989).

## II. The Motion To Suppress.

Defendant-appellant Mickens argues that the district court erred in denying his motion to suppress evidence obtained in the warrant-authorized search of the Dix Hills residence. He claims that the warrant was issued on the basis of information gathered during an improper "protec-

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1. Chief Judge Platt charged:

> During the course of the trial, I have had to admonish or reprimand attorneys on both sides of the case because I did not believe that what one or more of them was doing was proper. You should draw no inference against an attorney or his or her client .... It is irrelevant whether you like a lawyer or whether you believe I like a lawyer. The issue before you is not which attorney is more likeable or the better attorney. The issue is whether or not the government has sustained its burden of proof.
>
> * * *
>
> The fact that the Court has asked one or more questions of a witness for clarification or admissibility of evidence purposes is not to be taken by you in any way as indicating that the Court has any opinion as to the guilt or lack thereof of a defendant in this case, and you are to draw no such inference therefrom. That determination is up to you, and you alone, based on all of the facts in this case and the applicable law in these instructions.

tive sweep" of the residence, conducted by FBI agent Nerisa Pilafian in the process of arresting Mickens. Again, we disagree.

Law enforcement officers may conduct a protective sweep of a residence during the course of an arrest if they possess "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 110 S.Ct. 1093, 1099-1100 (1990). This standard was satisfied in the present case. The arresting officers had reason to believe that defendant-appellant Kearney and her mother -- both of whom resided in the house -- were on the premises. Moreover, as the district court found, "agents had reason to believe that Mickens was a drug dealer who was known to be violent and who travelled with others." Thus, Agent Pilafian had a reasonable basis to conduct the protective sweep of the Dix Hills residence. *See United States v. Escobar,* 805 F.2d 68, 71-72 (2d Cir. 1986); *United States v. Jackson,* 778 F.2d 933, 937 (2d Cir. 1985), *cert. denied,* 479 U.S. 910 (1986). Moreover, the scope of Agent Pilafian's protective sweep did not extend beyond the "cursory inspection" deemed proper by the Supreme Court. *Buie,* 110 S.Ct. at 1099. Accordingly, the district court properly refused to suppress the evidence yielded by the warrant-authorized search of the Dix Hills residence.

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## III. The Evidentiary Rulings.

### *A. The admission of threat evidence.*

Defendant-appellant Mickens challenges the district court's decision to permit Mickens' former attorney to testify that Mickens had made a hand gesture in the shape of a gun as the former attorney entered the courtroom to testify. Mickens argues that this testimony lacked probative value and that the former attorney's testimony that Mickens had pointed at the court, not at the attorney, was unduly prejudicial. This challenge lacks merit.

Evidence, such as the former attorney's testimony, offered under Fed. R. Evid. 404(b) may be admitted if the court: 1) determines that the evidence is offered for "a purpose other than to prove the defendant's bad character or criminal propensity," *United States v. Colon,* 880 F.2d 650, 656 (2d Cir. 1989); 2) determines that the evidence is relevant under Fed. R. Evid. 401 & 402, and is more probative than unfairly prejudicial under Fed. R. Evid. 403, *id.* (quoting *United States v. Ortiz,* 857 F.2d 900, 903 (2d Cir. 1988), *cert. denied,* 489 U.S. 1070 (1989)); and 3) provides an appropriate limiting instruction to the jury, if one is requested, *id.* (citing *Huddleston v. United States,* 485 U.S. 681, 691-92 (1988), and *United States v. Ortiz,* 857 F.2d at 903).

In the present case, the standards for admission of Rule 404(b) evidence were satisfied. The testimony about the hand gesture was not offered to prove Mickens' bad character or criminal propensity, but rather to prove his

consciousness of guilt. *See United States v. Bein,* 728 F.2d 107, 114 (2d Cir.), *cert. denied,* 469 U.S. 837 (1984). The testimony was relevant since an effort to intimidate a key prosecution witness was probative of Mickens' state of mind. Mickens argues that, because the testimony was that the threat was not directed at his former attorney, but at the court, the evidence should have been excluded under Rule 403. However, the fact that Mickens' hand gesture was directed at the court does not disprove that he attempted to threaten the witness. Indeed, Mickens' former attorney testified that he felt intimidated by the gesture. Moreover, only a preliminary hearing on the details of the witness' proposed testimony would have avoided the unanticipated statement that Mickens' gesture was directed at the court. While, in retrospect, such a preliminary hearing may have been helpful, it is simply not required by Rule 404(b). *See Huddleston,* 485 U.S. at 686-89. We also note that Mickens' acquittal of two counts of distributing cocaine belies the argument that admission of the threat evidence was unduly prejudicial to Mickens. In sum, the district court's decision to admit the testimony about Mickens' apparent threat was not an abuse of discretion. *See United States v. Qamar,* 671 F.2d 732, 736 (2d Cir. 1982); *see also United States v. Jamil,* 707 F.2d 638, 642 (2d Cir. 1983).

***B. The evidence of a prior narcotics conviction.***

Mickens contends that the district court erred in admitting evidence, pursuant to Fed. R. Evid. 404(b), of Mickens' prior involvement in narcotics activity, including his 1983 conviction for possessing and selling cocaine.

Defendant-appellant Kearney also argues that the court improperly admitted evidence that she visited Mickens while he was serving his prison term for the 1983 conviction. We reject both challenges.

Applying the standards discussed above, we hold that this evidence was properly admitted under Rule 404(b). Mickens' prior involvement in narcotics activity was relevant to the prosecution's tax evasion and money laundering theory that narcotics sales provided the cash which Mickens spent so lavishly. In addition, Kearney's visits to Mickens while he was incarcerated were relevant to the second element of the money laundering charge, *i.e.,* that Kearney knew that the laundered funds derived from an unlawful source. The district court's judgment that the probative value of this evidence was not substantially outweighed by its potential prejudicial effect was not an abuse of discretion. *See United States v. Smith,* 727 F.2d 214, 220 (2d Cir. 1984); *United States v. Birney,* 686 F.2d 102, 106 (2d Cir. 1982). Moreover, the court provided a limiting instruction to the jury, informing them of the appropriate use of this evidence. *See United States v. Ortiz,* 857 F.2d at 903.

***C. The in-court identification.***

Defendant-appellant Mickens contends that the court erred in permitting various automobile salesmen to identify him in court because those witnesses were previously shown unduly suggestive photo arrays. This contention is unpersuasive.

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The pre-trial photo array procedure which Mickens challenges was not "unduly suggestive of the suspect's guilt." *Dickerson v. Fogg,* 692 F.2d 238, 244 (2d Cir. 1982). Mickens' arguments notwithstanding, the fact that his picture was the only photocopy in the array is insignificant. *Cf. United States ex rel. Cannon v. Montanye,* 486 F.2d 263, 267 (2d Cir. 1973), *cert. denied,* 416 U.S. 962 (1974); *United States v. Fernandez,* 456 F.2d 638, 641 (2d Cir. 1972). Indeed, this difference was so minor that the district court did not notice that Mickens' picture was a photocopy until the defense pointed it out. *See United States v. Archibald,* 734 F.2d 938, 940 (2d Cir. 1984); *see also Jarrett v. Headley,* 802 F.2d 34, 41 (2d Cir. 1986). Even if Mickens' argument was accepted, it would be of little import since Mickens does not contest his involvement in the transactions in which he was identified. Mickens' defense is *not* mistaken identity, but that the various purchases were not made using the proceeds of narcotics activity. Accordingly, it was not error to permit the automobile salesmen who had spotted Mickens in the array to identify him in court.

**IV. The Jury Instruction Claim.**

Defendants-appellants Mickens, Kearney and Celifie contend that the district court's instructions to the jury regarding the elements of money laundering, 18 U.S.C. § 1956, constructively amended the indictment against them. We disagree.

To prove a violation of section 1956, the government must establish that a financial transaction

"involves the proceeds of *specified* unlawful activity." 18 U.S.C. § 1956(a)(1) (emphasis added). The government is further required to demonstrate that the defendant knew that "the property involved in [the] financial transaction represents the proceeds of *some form* of unlawful activity." *Id.* (emphasis added). The indictment counts charging defendants-appellants with money laundering, in pertinent part, stated:

> [Defendants-appellants] did knowingly and wilfully conduct and attempt to conduct a financial transaction which involved the proceeds of a specified unlawful activity, to wit: narcotics distribution, knowing that the property involved in such financial transaction, to wit: United States currency, represented the proceeds of some form of unlawful activity and knowing that the transaction was designed in whole or in part to conceal and disguise the nature, the source, the ownership and the control of the proceeds of a specified unlawful activity.

Paralleling the indictment, the district court instructed the jury, *inter alia:*

> The first element of the offense which the government must prove beyond a reasonable doubt is that the defendant you are considering in the count you are considering conducted or attempted to conduct a financial transaction involving property constituting the proceeds of specified unlawful activity, specifically, narcotics distribution.

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* * *

> The second element of the offense which the government must prove beyond a reasonable doubt is that the defendant you are considering in the count you are considering knew that the property involved in the financial transaction was the proceeds of some form of an unlawful activity.

This instruction accurately stated the applicable law and conformed to the terms of the indictment.

The defendants-appellants focus, however, on the court's explanation of the second element of section 1956. In this regard, the court instructed:

> I instruct you that this [second] element refers to a requirement that the defendant knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state or federal law.
>
> I instruct you as a matter of law that narcotics distribution is a felony, as is, for example, gambling.

Again, this instruction adheres to the indictment. Moreover, since the challenged instruction pertained only to the second element of section 1956, it did not enlarge the prosecution's theory regarding the first element, *i.e.*,

that the laundered money represented proceeds from narcotics activity. Accordingly, defendants-appellants' contention that the indictment charging them with violating section 1956 was constructively amended must be rejected. *See United States v. Weiss,* 752 F.2d 777, 787-88 (2d Cir.), *cert. denied,* 474 U.S. 944 (1985).

## V. The Constitutionality of 18 U.S.C. § 5313.

Defendants-appellants Mickens and Celifie moved before the district court for the dismissal of indictment counts alleging violation of 18 U.S.C. § 1956(a)(1)(B)(ii) and 31 U.S.C. § 5324 (1988), claiming that the domestic currency transaction report ("CTR") requirements giving rise to those charges are unconstitutional. Specifically, Mickens and Celifie argued that the CTRs required under 31 U.S.C. § 5313(a) (1988) violate the fifth amendment privilege against self-incrimination. The district court denied this motion, and defendants-appellants now challenge that denial. We reject this challenge.

The fifth amendment privilege against self-incrimination protects against governmental compulsion of self-incriminating testimonial communication. *See Fisher v. United States,* 425 U.S. 391, 397 (1976); *Couch v. United States,* 409 U.S. 322, 328 (1973). Section 5313(a) and its implementing regulations, 31 C.F.R. § 103.22 (1990), require financial institutions to report certain transactions. *See United States v. St. Michael's Credit Union,* 880 F.2d 579, 581-82 (1st Cir. 1989). Individuals, including defendants-appellants, are not themselves compelled to report their transactions. *See United States v. Hoyland,* 914

F.2d 1125, 1130 (9th Cir. 1990). Absent such compulsion, Mickens, Kearney, and Celifie may not complain that their fifth amendment rights were violated. *See Couch v. United States,* 409 U.S. at 328 ("The Constitution explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another."); *see also Hoyland,* 914 F.2d at 1130.

Moreover, even if 31 U.S.C. § 5313(a) were construed to compel reporting by defendants-appellants, we would find no fifth amendment violation. Reporting requirements have been considered violative of the fifth amendment if they "would almost necessarily provide the basis for criminal proceedings against [the reporting individual] for the very activity that he was required to disclose." *United States v. Dichne,* 612 F.2d 632, 640 (2d Cir. 1979), *cert. denied,* 445 U.S. 928 (1980); *see Grosso v. United States,* 390 U.S. 62, 67-68 (1968); *Marchetti v. United States,* 390 U.S. 39, 55-57 (1968). By contrast, section 5313(a) is a legitimate reporting requirement which targets transactions without regard to the purposes for which they are undertaken. *See Dichne,* 612 F.2d at 639-41. Section 5313(a) does not require the reporting of information that would necessarily be criminal. Like the foreign CTR requirements considered in *Dichne,* section 5313(a)'s reporting requirements do not violate the fifth amendment privilege against self-incrimination. *See United States v. Kaatz,* 705 F.2d 1237, 1242 (10th Cir. 1983); *United States v. Keller,* 730 F. Supp. 151, 156 (N.D. Ill. 1990); *United States v. Kimball,* 711 F. Supp. 1031, 1032-

34 (D. Nev. 1989); *United States v. Scanio,* 705 F. Supp. 768, 778-79 (W.D.N.Y. 1988).

**VI. Anthony Jacobs' Sentence.**

Defendant-appellant Anthony Jacobs, who pleaded guilty to conspiracy to distribute cocaine, conspiracy to defraud the United States, and distributing cocaine, challenges the sentence imposed on him by the district court. He contends that his sentence, which exceeds twenty-seven years' imprisonment, resulted from misapplication of the Sentencing Guidelines. We agree and, accordingly, remand to Chief Judge Platt for resentencing.

The district court's computation of Jacobs' offense level followed a two-step analysis in which, (1) the court approximated that the Mickens conspiracy distributed in excess of fifty kilograms of cocaine, based on Mickens' unexplained income of over $2,000,000 during the operation of the conspiracy; and, (2) the court attributed the full approximated amount distributed by the conspiracy to Anthony Jacobs. This quantity was added to the 24.4 grams of cocaine that Jacobs admitted to selling, and resulted in an offense level of 36. Matching Jacobs' Criminal History Category I with this offense level resulted in a sentence range of 262 to 327 months. The court sentenced Jacobs to the high end of that range.

The district court's initial step in calculating Jacobs' sentence was proper, as the commentary to the Guidelines reveals:

> Where . . . the amount [of drugs] seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records . . . .

U.S.S.G. § 2D1.4, application note 2. In theory, the court's second step was also proper. Pursuant to Guidelines § 1B1.3, one convicted of a narcotics conspiracy may be sentenced on the basis of "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." U.S.S.G. § 1B1.3, application note 1; *see United States v. Schaper,* 903 F.2d 891, 897-99 (2d Cir. 1990); *United States v. Candito,* 892 F.2d 182, 185 (2d Cir. 1989). However, as applied to Jacobs, attribution of the full approximated amount of cocaine distributed by the Mickens conspiracy was improper. *See United States v. Cardenas,* 917 F.2d 683, 687 (2d Cir. 1990). As Jacobs contends, such attribution

> unfairly [holds him] accountable for the narcotics equivalent of four years' worth of unreported income of another, whose funds may have been accumulated at any prior time, and may have come from any source -- including Mickens' independent, personal transactions in the early 1980's . . ., or some other narcotics conspiracy in which Mr. Jacobs played no part, or even from

> some altogether different activity such as gambling.

Absent reliable evidence connecting Jacobs to the quantity of narcotics extrapolated from Mickens' unreported income, Jacobs' 327-month sentence is unsupportable. Moreover, ascribing "managerial" status to Jacobs without conducting a hearing -- something which the probation department and prosecution originally agreed was necessary -- was erroneous. *See United States v. Lanese,* 890 F.2d 1284, 1293 (2d Cir. 1989), *cert. denied,* 110 S.Ct. 2207 (1990).

**VII. Bettina Jacobs Celifie's Sentence.**

In sentencing defendant-appellant, cross-appellee Bettina Jacobs Celifie to a term of imprisonment of eighteen months, the district court downwardly departed twenty-three months from the applicable sentencing range. The government cross-appeals from that sentence, contending that the departure was improperly based on Celifie's acceptance of responsibility and on the request for leniency made by the jury in announcing its guilty verdict. We agree and remand to Chief Judge Platt for resentencing.

A sentencing court may downwardly depart if it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (1988). Whether a particular factor is a permissible ground for departure is a legal issue, which

we review *de novo. United States v. Joyner,* Nos. 90-1171, -1224, slip op. 1539, 1549 (2d Cir. Jan. 24, 1990); *United States v. Barone,* 913 F.2d 46, 50 (2d Cir. 1990). "Departure authority, though not designed to prevent a sentencing judge from exercising 'discretion, flexibility or independent judgment,' is nonetheless a device for implementing the guideline system, not a means of casting it aside." *United States v. Joyner,* slip op. at 1551 (quoting *United States v. Lara,* 905 F.2d 599, 604 (2d Cir. 1990)).

In the present case, the district court apparently believed that the two-point reduction awarded for Celifie's acceptance of responsibility, U.S.S.G. § 3E1.1, did not adequately reflect the degree of her contrition. We do not foreclose the possibility that this rationale may, in an appropriate case, support a downward departure. However, in sentencing Celifie, the district court made no finding that the circumstances justified a departure for Celifie beyond the two-point reduction she received under the guidelines.

Moreover, the court erred in relying on the jury's recommendation of leniency for Celifie as a basis for downward departure. Sentencing decisions are solely the province of the judge. *See United States v. Romo,* 914 F.2d 889, 895 (7th Cir. 1990); *see also* United States Sentencing Commission, *Guidelines Manual,* Introduction (Nov. 1990) ("Pursuant to the [Sentencing Reform] Act, the *sentencing court* must select a sentence from within the guideline range.") (emphasis added). The jury's sympathy for Celifie may reflect circumstances that the court could appropriately consider in granting a downward departure.

However, reliance on the jury's request for lenient sentencing treatment of Celifie, without more, is an insufficient basis to justify a downward departure.

**Conclusion**

We have examined each of defendants-appellants' remaining arguments and find them to be without merit. In light of the foregoing, the district court's judgment is affirmed in part, reversed in part, and remanded to Chief Judge Platt.

**Appendix B**
**Order of United States Court of Appeals**
**on Petition for Rehearing**
**and Suggestion for Rehearing In Banc**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of April, one thousand nine hundred and ninety-one.

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FILED: April 30, 1991

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DOCKET NUMBERS 90-1061(L), 90-1062, 90-1063, 90-1064, 90-1097

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UNITED STATES OF AMERICA,

*Appellee,*

-v.-

THOMAS MICKENS, GEORGE JENKINS, ANTHONY JACOBS, SHELBY KEARNEY, NORVELL YOUNG, and BETTINA JACOBS CELIFIE,

*Defendants,*

*Appendix B*
*Order of United States Court of Appeals*
*on Petition for Rehearing*
*and Suggestion for Rehearing In Banc*

THOMAS MICKENS, ANTHONY JACOBS,
SHELBY KEARNEY, and BETTINA JACOBS CELIFIE,
*Defendants-Appellants.*

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UNITED STATES OF AMERICA,
*Appellee, Cross-Appellant,*

-v.-

BETTINA JACOBS CELIFIE,
*Defendant-Appellant,*
*Cross-Appellee.*

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants THOMAS MICKENS and SHELBY KEARNEY,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

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*on Petition for Rehearing*
*and Suggestion for Rehearing In Banc*

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
ELAINE B. GOLDSMITH
Clerk

**Appendix C**
**Excerpts of Court's Charge From Trial Transcript of United States District Court**

*(page 8341)*

* * *

Count 21 charges defendant Mickens and the defendant Bettina Jacobs Celifie.

Let's begin with Count Thirteen.

On or about and between November 25, 1986 and November 28, 1986, within the Eastern District of New York and elsewhere, the defendant Thomas Mickens also known as Thomas Harris, Thomas Harries, James Dean and Montana, did knowingly and willfully conduct an attempt to conduct a financial transaction which involved the proceeds of a specified unlawful activity, to wit, narcotics distribution, knowing that the property involved in such financial transaction, to wit, United States currency, represented the proceeds of some form of unlawful activity and knowing that the transaction was designed in whole or in part to conceal and disguise the nature, the source, the ownership and the control of the proceeds of a specified unlawful activity.

Count Fourteen, as you will see, is substantially the same, except it pertains between November 3, 1986 and December 26, 1986.

Count Fifteen pertains to on or about January 6, 1987.

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*Excerpts of Court's Charge From Trial Transcript*
*of United States District Court*

Count Sixteen pertains to the dates between February 1, 1987 and February 18, 1987.

Count Eighteen -- we skip 17 for the moment -- pertains to the dates between April 17, 1987 and May 29, 1987.

* * *

*(pages 8343-8345)*

* * *

... Mickens with knowingly and willfully conducting a financial transaction with narcotics proceeds in order to avoid a transaction reporting requirement under the federal law.

The statute that the defendants are alleged to have violated in these counts is the so-called money laundering statute. Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 1956(a)(1)(B)(ii).

It provides in pertinent part as follows:

Whoever, knowing that the property involved in the financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity, knowing that the transaction is designed in whole or in part, either to conceal or disguise the nature of the location or the source, the

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*Excerpts of Court's Charge From Trial Transcript*
*of United States District Court*

ownership or the control of the proceeds of specified unlawful activity, or to avoid a transaction reporting requirement under State or Federal law is guilty of an offense against the United States.

In order to prove the crime of money laundering in violation of this statute, in one or more of these counts, 13 through 16 and 18 through 21, the government must establish beyond a reasonable doubt each of the following essential elements.

First, that the defendant you are considering in the count you are considering conducted or attempted to conduct a financial transaction involving property constituting the proceeds of specified unlawful activity, specifically narcotics distribution.

Second, that that defendant knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity.

Third, that the defendant knew that the transaction was designed in whole or in part either, one, to conceal or disguise the nature of the location, the source, the ownership or the control of the proceeds as specified in the unlawful activity, or two, to avoid a transaction reporting requirement under State or Federal law.

The first element of the offense which the government must prove beyond a reasonable doubt is that the defendant you are considering in the count you are

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considering conducted or attempted to conduct a financial transaction involving property constituting the proceeds of specified unlawful activity, specifically, narcotics distribution. A number of these terms require definition.

The term "financial transaction" means a transaction involving one or more monetary instruments which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect interstate or foreign commerce in any way or degree.

A "transaction" would include a purchase, sale, pledge, loan, gift, transfer, delivery or other disposition, and with respect to financial institution would include a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, or any other payment, transfer or delivery by or through or to a financial institution by whatever means effected.

The term "conducts" includes initiating, concluding or participating in initiating or concluding a transaction.

The term "specified unlawful activity" means, among other things, narcotics distribution.

The second element of the offense which the government must prove beyond a reasonable doubt is that the defendant you are considering in the count you are considering knew that the property involved in the

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financial transaction was the proceeds of some form of an unlawful activity.

I instruct you that this element refers to a requirement that the defendant knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state or federal law.

I instruct you as a matter of law that narcotics distribution is a felony, as is, for example, gambling.

The third element of the offense which the government must prove beyond a reasonable doubt is that the defendant you ....

* * *

*(page 8436)*

* * *

... clear and convincing evidence. Proof of the connection to the Eastern District of New York does not have to be proved beyond a reasonable doubt, only by clear and convincing evidence.

With respect to counts 13 through 16 and 18 through 21, in discussing the second element, the money laundering count, I said the second element of the offense which the Government must prove beyond a reasonable doubt is that the defendant you're considering in the count

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knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity.

I instruct you that this element refers to a requirement that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony under State or Federal law, and then I instructed you as a matter of law that narcotic distribution is a felony, but so are many other types of activities, illegal activities, and I think I said so is illegal gambling, but I don't want to restrict it to that.

The knowledge is that the property involved in the financial transaction was the proceeds of some form of unlawful activity. That's the second element of their offense.

With respect to count seven, the pertinent statute,

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* * *